SUPREME COURT, U. S.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1958

No. 88

EDGAR B. SIMS, PETITIONER,

vs.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 7, 1958
CERTIORARI GRANTED OCTOBER 13, 1958

SUPREME COURT OF THE UNITED STATES

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IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Appendix to Brief of Appellant

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

Civil Action No. 1794

UNITED STATES OF AMERICA, Plaintiff,

v.

EDGAR B. SIMS, Individually and State Auditor of the State of West Virginia, Defendant.

COMPLAINT

Now comes the United States of America, by Duncan W. Daugherty, United States Attorney in and for the Southern District of West Virginia, and for its claim against the above-named defendant, alleges as follows:

I

The plaintiff is a corporation sovereign and body politic.

II

This action is brought under the direction of the Attorney General of the United States at the request of the Commissioner of Internal Revenue and pursuant to the provisions of the Internal Revenue Code of 1954, Sections 7401, 6331 and 6332.

[fol. 2]

III

The defendant, Edgar B. Sims, during all times hereinafter mentioned was and now is the qualified and acting State Auditor of the State of West Virginia.

IV

The defendant, Edgar B. Sims, resides in the Southern Judicial District of West Virginia.

V

Henry Hart, is and was at all times hereinafter mentioned indebted to the plaintiff due to income tax deficiencies for the years 1946, 1950 and 1951.

The Commissioner of Internal Revenue made an assessment of these tax deficiencies. The assessment list was received by the then Collector of Internal Revenue at Parkersburg, West Virginia, on or about April 3, 1953 who demanded payment of said assessment from Henry Hart. Nevertheless, no part of this tax deficiency has been paid at the time of filing this complaint.

Said tax deficiency remained unpaid for more than ten days after demand for payment had been made and said ten day period had elapsed prior to the serving of the notices of levy on the defendant, Edgar B. Sims, as hereinafter set forth.

VI

Alvin B. and Alma Alexander, are and were at all times hereinafter mentioned indebted to the plaintiff due to income tax deficiencies for the year 1953. The Commissioner of Internal Revenue made an assessment of this tax de-
[fol. 3] ficiency. The assessment list was received by the then Collector of Internal Revenue at Parkersburg, West Virginia, on or about May 20, 1954; who demanded payment of said assessment from Alvin S. and Alma Alexander. No part of this tax deficiency has been paid at the time of filing this complaint.

This tax deficiency remained unpaid for more than ten days after said demand for payment had been made and said ten day period had elapsed prior to the serving of the notices of levy on the defendant, Edgar B. Sims, as hereinafter set forth.

VII

Kathleen Wheeler, is and was at all times hereinafter mentioned indebted to the plaintiff due to income tax deficiencies for the year 1953. The Commissioner of Internal Revenue made an assessment of this tax deficiency and the assessment list was received by the Collector of Internal Revenue at Parkersburg, West Virginia on or about April 1, 1954, who demanded payment of said assessment from Kathleen Wheeler. No part of this tax deficiency has been paid at the time of filing this complaint.

This tax deficiency remained unpaid for more than ten days after said demand for payment had been made. Said ten day period had elapsed prior to the serving of the notices of levy on the defendant, Edgar B. Sims, as hereinafter set forth.

VIII

Elbert M. Henderson, Sr., is and was at all times hereinafter mentioned indebted to the plaintiff due to income tax [fol. 4] deficiencies for the years 1952 and 1953. The Commissioner of Internal Revenue made an assessment of these tax deficiencies. The assessment list for the 1952 deficiency was received by the Collector of Internal Revenue at Parkersburg, West Virginia, on or about April 2, 1953, and the assessment list for the 1953 deficiency was received by said Collector on or about April 15, 1954, who demanded payment of said assessments from Elbert M. Henderson, Sr. No part of this tax deficiency has been paid at the time of filing this complaint.

This tax deficiency remained unpaid for more than ten days after said demands for payment had been made. Said ten day periods had elapsed prior to the serving of the notices of levy on the defendant, Edgar B. Sims, as hereinafter set forth.

IX

Willie R. Childers, is and was at all times hereinafter mentioned indebted to the plaintiff due to income tax deficiencies for the years 1952, 1953 and 1954. The Commissioner of Internal Revenue made assessments of these tax deficiencies. The assessment list for the 1952 deficiency was

received by the Collector of Internal Revenue at Parkersburg, West Virginia, on or shortly after March 23, 1953, and the assessment list for the 1953 deficiency was received by said Collector on or shortly after April 15, 1954, who demanded payment of said assessment from Willie R. Childers. The assessment for the 1954 deficiency was made on May 11, 1955; the Collector of Internal Revenue at Parkersburg, West Virginia demanded payment of this assessment from Willie R. Childers. No part of these tax defi- [fol. 5] ciencies has been paid at the time of filing this complaint.

These tax deficiencies remained unpaid for more than ten days after said demands for payment had been made. Said ten day period had elapsed prior to the serving of the notices of levy on the defendant, Edgar B. Sims, as hereinafter set forth.

X

Said Henry Hart, Alvin S. and Alma Alexander, Kathleen Wheeler and Elbert M. Henderson, Sr., were employed by the State of West Virginia and had accrued wages due and owing at the time notices of levy were made these wages as hereinafter set forth.

XI

On April 20, 1953, Notice of Federal tax liens upon all property and rights to property of said Henry Hart, was filed with the Clerk of the Court, Kanawha County, Charleston, West Virginia.

XII

On August 17, 1955, Notices of Federal tax liens upon all property and rights to property of said Alvin S. and Alma Alexander, were filed with the Clerk of the Court, Kanawha County, Charleston, West Virginia.

XIII

On October 27, 1955, Notices of Federal tax liens upon all property and rights to property of said Kathleen Wheeler and Elbert M. Henderson, Sr., were filed with the Clerk of

[fol. 6] the Court, Kanawha County, Charleston, West Virginia.

XIV

On February 3, 1956, Notices of Federal tax liens upon all property and rights to property of said Willie R. Childers, was filed with the Clerk of the Cabell County Court, Huntington, West Virginia.

XV

On December 14, 1955, notice of levy upon the accrued wages of said Henry Hart in the amount of $1,562.61, and demand for payment was served upon the defendant, Edgar B. Sims, pursuant to Section 6331(a), Internal Revenue Code of 1954.

XVI

On October 27, 1955, notice of levy upon the accrued wages of said Alvin S. and Alma Alexander, in the amount of $228.64 and demand for payment was served upon the defendant, Edgar B. Sims, pursuant to Section 6331(a), Internal Revenue Code of 1954.

XVII

On October 27, 1955, notice of levy upon the accrued wages of said Kathleen Wheeler in the amount of $84.56 and demand for payment was served upon the defendant, Edgar B. Sims, pursuant to Section 6331(a), Internal Revenue Code of 1954.

XVIII

On October 27, 1955, notice of levy upon the accrued wages of said Elbert M. Henderson, Sr., in the amount of [fol. 7] $308.50 and demand for payment was served upon the defendant, Edgar B. Sims, pursuant to Section 6331(a), Internal Revenue Code of 1954.

XIX

On January 18, 1956, notice of levy upon the accrued wages of said Willie R. Childers, in the amount of $337.90

and demand for payment were served upon the defendant, Edgar B. Sims, pursuant to Section 6331(a), Internal Revenue Code of 1954.

XX

At the time notices of levy and demands for payment were served upon Edgar B. Sims, as set out in paragraphs XV, XVI, XVII, XVIII and XIX, said defendant Edgar B. Sims, as State Auditor of the State of West Virginia was indebted and obligated to the persons upon whose wages said levies were made, to pay them their wages which had accrued at that time.

XXI

On December 16, 1955, pursuant to Section 6332(a), Internal Revenue Code of 1954, final demands were made upon the defendant, Edgar B. Sims, to surrender to the District Director of Internal Revenue, Parkersburg, West Virginia, accrued wages which were subject to the levy as set out in paragraph XV of this complaint.

XXII

On November 7, 1955, pursuant to Section 6332(a), Internal Revenue Code of 1954, final demand was made upon the defendant to surrender to the District Director of In-
[fol. 8] ternal Revenue, Parkersburg, West Virginia, accrued wages which were subject to the levies set out in paragraphs XVI, XVII, and XVIII of this complaint.

XXIII

On March 7, 1956, pursuant to Section 6332(a), Internal Revenue Code of 1954, final demand was made upon the defendant to surrender to the District Director of Internal Revenue, Parkersburg, West Virginia, accrued wages which were subject to the levy as set out in paragraph XIX of this complaint.

XXIV

Nevertheless, the defendant has at all times refused to surrender said accrued wages to the District Director, Par-

kersburg, West Virginia, and at the present time these levies remain completely unsatisfied.

XXV

Wherefore, plaintiff prays:

1. That the defendant, Edgar B. Sims, as Auditor of the State of West Virginia, be required to submit to this Court an accounting of all wages which he has paid, has been obligated to pay, or is presently obligated to pay, to Henry Hart, which had accrued as of December 14, 1955, which is the date that notice of levy upon the wages of that taxpayer was served on said Edgar B. Sims, and further, that the defendant also be required to submit to this court an accounting of all wages which he has paid, has been obligated to pay, or is presently obligated to pay to Alvin S. Alexander and Alma Alexander, Kathleen Wheeler and Elbert [fol. 9] M. Henderson, Sr., which had accrued as of October 27, 1955, which is the date that notice of levy upon the wages of these taxpayers was served on the defendant, and further, that the defendant also be required to submit to this court an accounting of all wages which he has paid, has been obligated to pay, or is presently obligated to pay to said Willie R. Childers, which had accrued as of January 18, 1956, which is the date that notice of levy upon the wages of this taxpayer was served upon the defendant.

2. That this Court adjudge and decree that the plaintiff had during all times since April 3, 1953, valid and subsisting liens for the tax deficiencies of said Henry Hart, plus penalties and interest, upon all property and property rights of the defendant, Henry Hart and specifically upon the accrued wages in the possession of the defendant, Edgar B. Sims.

3. That this Court adjudge and decree that the plaintiff had during all times since May 20, 1954, valid and subsisting liens for tax deficiencies, of said Alvin S. and Alma Alexander, plus penalties and interest, upon all property and property rights of the defendants, Alvin S. and Alma Alexander and specifically upon accrued wages in the possession of the defendant, Edgar B. Sims.

4. That this Court adjudge and decree that the plaintiff had during all times since April 1, 1954, valid and subsisting liens for tax deficiencies, of said Kathleen Wheeler, plus penalties and interest, upon all property and property rights of the defendant, Kathleen Wheeler and specifically upon accrued wages in the possession of the defendant, Edgar B. Sims.

[fol. 10] 5. That this Court adjudge and decree that the plaintiff had during all times since April 2, 1953, valid and subsisting liens for the tax deficiencies, of said Elbert M. Henderson, Sr., for the year 1952, plus penalties and interest, and that this Court adjudge and decree that the plaintiff had during all times since April 12, 1954 valid and subsisting liens for tax deficiency of said Elbert M. Henderson, Sr., for the year 1953 plus penalties and interest, upon all property and property rights of said, Elbert M. Henderson, Sr., and specifically upon accrued wages in the possession of the defendant, Edgar B. Sims.

6. That this Court adjudge and decree that the plaintiff had during all times since March 23, 1953 or shortly thereafter, valid and subsisting liens for the tax deficiencies of said Willie R. Childers for the year 1952, plus penalties and interest, and that this Court adjudge and decree that the plaintiff had during all times since April 15, 1954 or shortly thereafter, valid and subsisting liens for the tax deficiency of said Willie R. Childers, for the year 1953, plus penalties and interest, and that this Court adjudge and decree that the plaintiff had during all times since May 11, 1955, valid and subsisting liens for the tax deficiency of said Willie R. Childers, for the year 1954, plus penalties and interest, upon all property and property rights of said Willie R. Childers, and specifically upon accrued wages in the possession of the defendant Edgar B. Sims.

7. That, pursuant to Section 6332(b), Internal Revenue Code of 1954, it have judgment against the defendant, Edgar B. Sims, in an amount equal to the amount of wages due and owing to said Henry Hart as of December 14, 1955, plus interest as provided by law. However, such recovery [fol. 11] shall not be in excess of $1,562.61 which is the

amount of taxes for which levy on that taxpayers wages was made, plus interest as provided by law.

8. That, pursuant to Section 6332(b), Internal Revenue Code of 1954, it have judgment against the defendant, Edgar B. Sims, in an amount equal to the amount of wages due and owing to said Alvin S. Alexander or Alma Alexander, as of October 27, 1955, plus interest as provided for by law. However, such recovery shall not be in excess of $228.64 which is the amount of taxes for which levy upon that taxpayers wages was made, plus interest as provided for by law.

9. That pursuant to Section 6332(b), Internal Revenue Code of 1954, it have judgment against the defendant, Edgar B. Sims, in an amount equal to the amount of wages due and owing to said Kathleen Wheeler, as of October 27, 1955, plus interest as provided for by law. However, such recovery shall not be in excess of $84.56 which is the amount of taxes for which levy on that taxpayers wages was made, plus interest as provided for by law.

10. That pursuant to Section 6332(b), Internal Revenue Code of 1954, it have judgment against the defendant, Edgar B. Sims, in an amount equal to the amount of wages due and owing to said Elbert M. Henderson, Sr., as of October 27, 1955, plus interest as provided for by law. However, such recovery shall not be in excess of $308.50 which is the amount of taxes for which levy on that taxpayers wages was made, plus interest as provided for by law.

[fol. 12] 11. That pursuant to Section 6332(b), Internal Revenue Code of 1954, it have judgment against the defendant, Edgar B. Sims, in an amount equal to the amount of wages due and owing to said Willie R. Childers, as of January 18, 1956, plus interest as provided for by law. However, such recovery shall not be in excess of $337.90, which is the amount of taxes for which levy on that taxpayer's wages was made, plus interest as provided for by law.

12. That the plaintiff be awarded the cost of this action.

13. That the plaintiff have such other and further relief as to the Court may seem proper.

Percy H. Brown, Asst. United States Attorney.

[fol. 13]

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

[Title omitted]

DEFENDANT'S MOTION TO DISMISS

The defendant moves the court as follows:

1. To dismiss the action because the complaint fails to state a claim against the defendant upon which relief can be granted.

2. To dismiss the action or, in lieu thereof, to quash the return of service of summons, on the grounds (a) that the defendant, in performing the acts complained of, was acting only in his official capacity as an officer or agent of the state, and (b) that such action against him is an action against the State of West Virginia which is prohibited by the provisions of Article VI, Section 35, of the West Virginia Constitution, and the Eleventh Amendment to the United States Constitution.

[fol. 14] 3. To dismiss the action for the reason that Sections 6331 and 6332 of the Internal Revenue Code of 1954 do not authorize the direction of the levy contemplated therein against a state or an officer thereof.

4. To dismiss the action because the defendant, as Auditor of the State of West Virginia, is not a person in possession of or obligated with respect to property or rights to property subject to levy, as contemplated by Section 6332 of the Internal Revenue Code of 1954.

5. To dismiss the action because (a) the defendant is not an employer for whom the taxpayer performs a service, and (b) he does not have control of the payment for services rendered in the State of West Virginia or any agency thereof.

6. To dismiss the action on the ground of the failure to join indispensable parties, in that the plaintiff failed to join, as parties defendant, the five taxpayers, some-

times referred to in said complaint as defendants, the head of the spending unit for whom the taxpayer performs services, the director of the budget and the state treasurer.

John G. Fox, Attorney General for the State of West Virginia, State Capitol, Charleston, West Virginia; Fred H. Caplan, Assistant Attorney General for the State of West Virginia, State Capitol, Charleston, West Virginia, Counsel for Defendant.

[fol. 15]

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

Civil Action File No. 1794

UNITED STATES OF AMERICA, Plaintiff,

vs.

EDGAR B. SIMS, Individually and State Auditor of the State of West Virginia, Defendant.

ORDER ON MOTION TO DISMISS—September 10, 1957

This cause came on for hearing upon defendant's motion to dismiss, whereupon arguments were presented and briefs were filed by counsel for plaintiff and defendant. After careful consideration of the matters so presented, this court, by letter dated October 15, 1956, informed respective counsel that defendant's motion to dismiss was overruled insofar as it related to the defendant in his individual capacity, but that the motion must be granted, insofar as it related to the defendant as Auditor of the State of West Virginia. In accordance with the rulings contained in the aforementioned letter, it is hereby Ordered and Decreed that defendant's said motion to dismiss be overruled as to the defendant in his individual capacity, but that said motion be granted insofar as it relates to the defendant as Auditor of the State of West Virginia.

[fol. 16] This Order, having been inadvertently omitted subsequent to the court's ruling on said motion to dismiss, is hereby entered nunc pro tunc.

Entered: 10th day of September, 1957.

/s/ Ben Moore, Judge.

Approved as to form:

/s/ Fred H. Caplan, Assistant Attorney General, State of West Virginia.

/s/ Percy H. Brown, Assistant United States Attorney.

[fol. 17]

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

[Title omitted]

ANSWER OF DEFENDANT EDGAR B. SIMS

I

Defendant, Edgar B. Sims, admits the allegation contained in paragraphs I, III, IV, and X of the complaint.

II

Defendant, Edgar B. Sims, is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs II, V, VI, VII, VIII, IX, XI, XII, XIII, and XIV of the complaint.

III

Defendant, Edgar B. Sims, admits the allegations contained in paragraphs XV, XVI, XVII, and XVIII of the complaint, except that he denies that such levy was served upon him in his individual capacity, but rather was served upon him as Auditor of the State and was directed to [fol. 18] the State of West Virginia, as the person holding property, moneys, etc., belonging to the taxpayer.

IV

Defendant, Edgar B. Sims, admits the allegations of paragraph XIX of the complaint, except that he denies that such levy was served upon him in his individual capacity, but rather was served upon him as Auditor of the State and was directed to him in his capacity as State Auditor of the State of West Virginia, as the person holding property, moneys, etc., belonging to the taxpayer.

V

Defendant, Edgar B. Sims, denies the allegations contained in paragraphs XX, XXI, XXII, and XXIII of the complaint.

VI

Defendant, Edgar B. Sims, admits the allegations contained in paragraph XXIV of the complaint, except that he denies that, in his individual capacity, he had any right or duty to surrender said accrued wages.

First Defense

The complaint fails to state a claim against the defendant, Edgar B. Sims, individually, upon which relief can be granted.

Second Defense

The defendant, in his individual capacity, had neither the authority nor the duty to surrender the accrued wages [fol. 19] of the taxpayers, as demanded in the complaint.

Third Defense

The defendant, Edgar B. Sims, in his individual capacity, is not a person in possession of or obligated with respect to property or rights to property subject to levy, as contemplated by Section 6332 of the Internal Revenue Code of 1954.

Fourth Defense

The defendant, in his individual capacity, is not an employer for whom the taxpayer performs a service.

Fifth Defense

The complaint fails to allege that the defendant, Edgar B. Sims, individually, was indebted and obligated to the persons, upon whose wages said levies were made, to pay them their wages which had accrued at that time.

John G. Fox, Attorney General for the State of West Virginia, State Capitol, Charleston, West Virginia; Fred H. Caplan, Assistant Attorney General, State Capitol, Charleston, West Virginia, Counsel for Defendant.

[fol. 20]

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

[Title omitted]

STIPULATION OF FACTS

The parties to the above case, through their respective attorneys, agree that for the purposes of this action the following facts may be taken as true, subject, however, to the right of either party to present such further oral or written evidence as is not inconsistent herewith.

1. This action was brought under the direction of the Attorney General of the United States at the request and authorization of the Commissioner of Internal Revenue.

2. Henry Hart, is and was at all times hereinafter mentioned indebted to the plaintiff for income tax deficiencies for the years 1946, 1950 and 1951 in the total amount of $1,562.61, including statutory additions as of December 5, 1955.

[fol. 21] The Commissioner of Internal Revenue made an assessment of these tax deficiencies. The assessment list was received by the then Director of Internal Revenue at Parkersburg, West Virginia on or about April 3, 1953, who demanded payment of said assessed deficiencies from Henry Hart. Nevertheless, no part of this tax deficiency has been paid at the time of filing this complaint.

Said tax deficiency remained unpaid for more than ten days after demand for payment had been made and said ten-day period had elapsed prior to the serving of the notices of levy on the defendant, Edgar B. Sims, Auditor, State of West Virginia. Said notice of levy in the amount of $1,562.61, including statutory additions, was served on the defendant on December 14, 1955.

3. Alvin S. and Alma Alexander, are and were at all times hereinafter mentioned indebted to the plaintiff for income tax deficiencies for the year 1953 in the amount of $228.64, including statutory additions as of October 27, 1955.

The Commissioner of Internal Revenue made an assessment of this tax deficiency. The assessment list was received by the then Collector of Internal Revenue at Parkersburg, West Virginia, on or about May 20, 1954, who demanded payment of said assessed deficiencies from Alvin S. and Alma Alexander. No part of this tax deficiency has been paid at the time of filing this complaint.

This tax deficiency remained unpaid for more than ten days after said demand for payment had been made and said ten-day period had elapsed prior to the serving of [fol. 22] the notices of levy on the defendant, Edgar B. Sims, Auditor, State of West Virginia. Said notice of levy, in the amount of $228.64, including statutory additions, was served on the defendant on October 27, 1955.

4. Kathleen Wheeler, is and was at all times hereinafter mentioned indebted to the plaintiff for income tax deficiencies for the year 1953 in the amount of $84.56, including statutory additions as of October 27, 1955.

The Commissioner of Internal Revenue made an assessment of this tax deficiency and the assessment list was received by the then Collector of Internal Revenue at Parkersburg, West Virginia, on or about April 1, 1954, who demanded payment of said assessed deficiencies from Kathleen Wheeler. No part of this tax deficiency has been paid at the time of filing this complaint.

This tax deficiency remained unpaid for more than ten days after said demand for payment had been made and said ten-day period had elapsed prior to the serving of

the notices of levy on the defendant, Edgar B. Sims, Auditor, State of West Virginia. Said notice of levy in the amount of $84.56, including statutory additions, was served on the defendant on October 27, 1955.

5. For the period December 1, 1955 through December 16, 1955, said Henry Hart received a "take home pay" of $117.00 which was paid by a warrant numbered 44693, issued by the defendant, Edgar B. Sims, State Auditor, State of West Virginia.

[fol. 23] 6. As of December 14, 1955 said Henry Hart had accrued a "take home pay" of $93.60.

7. For the period October 1, 1955 through October 31, 1955, Kathleen Wheeler received a "take home pay" of $178.00, which was paid by a warrant numbered 988857 issued by the defendant, Edgar B. Sims, State Auditor, State of West Virginia.

8. As of October 27, 1955 said Kathleen Wheeler had accrued a "take home pay" of $160.68.

9. For the period October 1, 1955 through October 31, 1955, said Alvin S. Alexander received a "take home pay" of $293.50 which was paid by a warrant numbered 990280 issued by the defendant, Edgar B. Sims, Auditor, State of West Virginia.

10. As of October 27, 1955 said Alvin S. Alexander had accrued a "take home pay" of $265.43.

11. On December 16, 1955, final demand was made upon the defendant, Edgar B. Sims, Auditor, State of West Virginia, to surrender to the District Director of Internal Revenue, Parkersburg, West Virginia, any wages of said Henry Hart which were subject to the aforementioned levy.

12. On November 7, 1955, final demand was made upon the defendant, Edgar B. Sims, Auditor, State of West Virginia, to surrender to the District Director of Internal Revenue, Parkersburg, West Virginia, any wages of said Kathleen Wheeler which were subject to the aforementioned levy.

[fol. 24] 13. On November 7, 1955, final demand was made upon the defendant, Edgar B. Sims, Auditor, State of West Virginia, to surrender to the District Director of Internal Revenue, Parkersburg, West Virginia, any wages of said Alvin S. Alexander which were subject to the aforementioned levy.

14. The parties have intentionally omitted from this stipulation any reference to levies made upon the wages of Elbert M. Henderson or Willie R. Childers, as the defendant is presently unable to locate the relevant records of these persons' wage payments. Therefore, in order to save the court and parties the time and inconvenience of lengthy proof, the plaintiff is presently willing to have any possible liability for not honoring the levies upon the wages of these persons omitted from any judgment it may receive in this case.

However, it is agreed that should the defendant locate these records he will so inform the plaintiff and this stipulation will be amended accordingly.

/s/ Fred H. Caplan, Assistant Attorney General, State of West Virginia.

/s/ Percy H. Brown, Assistant United States Attorney.

[fol. 25]

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

Civil Action No. 1794

UNITED STATES OF AMERICA, Plaintiff,

vs.

EDGAR B. SIMS, Individually and State Auditor of the State of West Virginia, Defendant.

JUDGMENT ORDER—July 24, 1957

This cause came on to be heard before the Court sitting without a jury on May 23, 1957. The facts were fully stipulated and after briefs and oral arguments being submitted by the parties, the Court concludes as a matter of law that the plaintiff is entitled to a judgment against this defendant. It is hereby Ordered and Decreed that the plaintiff have judgment against the defendant, Edgar B. Sims, in the amount of Five Hundred Nineteen Dollars and Seventy-one Cents ($519.71) plus interest as provided for by law.

[fol. 26] Dated this 24th day of July, 1957.

/s/ Ben Moore, Honorable Judge Ben Moore.

Approved as to form:

/s/ Fred H. Caplan, Assistant Attorney General, State of West Virginia.

/s/ Percy H. Brown, Assistant United States Attorney.

[fol. 27]

IN UNITED STATES DISTRICT COURT

NOTICE OF LEVY

Form 668-A
Rev. Jan. 1955

U. S. Treasury Department — Internal Revenue Service
Notice of Levy

To: (Name of person holding property, moneys, etc., belonging to taxpayer)

State of West Virginia, West Virginia State Liquor Control Commission, 1715½ Washington St. E. Charleston, West Va.

You are hereby notified that there is now due, owing, and unpaid from

Name and Address of Taxpayer

Henry Hart
614½ Court Street, Charleston, West Virginia

to the United States of America the sum of

One Thousand Five Hundred Sixty-two and 61/100 Dollars $1,562.61

for Internal Revenue Taxes, to wit:

Period and Type of Tax	Date of Assessment	Account No.	Unpaid Balance	Statutory Additions	Total
1946 Income	4-1-53	4-1-53 SPL #1 02 P	$1,027.87	$201.01	$1,228.88
1950 Income	4-1-53	4-1-53 SPL #1 04 P	172.79	26.49	199.28
1951 Income	4-1-53	4-1-53 SPL #1 06 P	116.39	18.06	134.45
		Total Amount Due			$1,562.61

You are further notified that demand has been made upon the taxpayer for the amount set forth herein, and that such amount is still due, owing, and unpaid from this taxpayer, and that the lien provided for by Section 6321, Internal Revenue Code of 1954, now exists upon

all property or rights to property belonging to the aforesaid taxpayer. Accordingly, you are further notified that all property, rights to property, moneys, credits, and bank deposits now in your possession and belonging to this taxpayer (or with respect to which you are obligated) and all sums of money or other obligations owing from you to this taxpayer are hereby levied upon and seized for satisfaction of the aforesaid tax, together with all additions provided by law, and demand is hereby made upon you for the amount necessary to satisfy the liability set forth herein, or for such lesser sum as you may be indebted to him, to be applied as a payment on his tax liability.

Dated at Parkersburg, West Virginia this 5th day of December 1955

District Director of Internal Revenue
P. L. Charles

By (Signature)
/s/ T. T. Rhodes

Title
Group Supervisor

Certificate of Service

I hereby certify that this levy was served by handing a copy of this notice of levy to

Name and Title
Edgar B. Sims, Auditor, State of WVa

on 12/14, 1955 at a.m. p.m.

Collection Officer (Signature)
/s/ Ralph L. Wilson

[fol. 28]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Appendix to Brief of Appellee

APPENDIX A

Constitution of the United States:

Article I

* * * * * * *

Section 8. The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States.

* * * * * * *

Article VI

* * * * * * *

Clause 2. This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

* * * * * * *

Internal Revenue Code of 1954:

Sec. 6331. Levy and Distraint.

(a) Authority of Secretary or Delegate.—If any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the Secretary or his delegate

to collect such tax (and such further sum as shall be sufficient to cover the expenses of the levy) by levy upon all property and rights to property (except such property as is exempt under section 6334) belonging to such person or on which there is a lien provided in this chapter for the payment of such tax. [fol. 29] Levy may be made upon the accrued salary or wages of any officer, employee, or elected official, of the United States, the District of Columbia, or any agency or instrumentality of the United States or the District of Columbia, by serving a notice of levy on the employer (as defined in section 3401(d)) of such officer, employee, or elected official. If the Secretary or his delegate makes a finding that the collection of such tax is in jeopardy, notice and demand for immediate payment of such tax may be made by the Secretary or his delegate and, upon failure or refusal to pay such tax, collection thereof by levy shall be lawful without regard to the 10-day period provided in this section.

* * * * * * *

(26 U.S.C. 1952 ed., Supp. II, Sec. 6331.)

Sec. 6332. Surrender of Property Subject to Levy.

(a) Requirement.—Any person in possession of (or obligated with respect to) property or rights to property subject to levy upon which a levy has been made shall, upon demand of the Secretary or his delegate, surrender such property or rights (or discharge such obligation) to the Secretary or his delegate, except such part of the property or rights as is, at the time of such demand, subject to an attachment or execution under any judicial process.

(b) Penalty for Violation.—Any person who fails or refuses to surrender as required by subsection (a) any property or rights to property, subject to levy, upon demand by the Secretary or his delegate, shall be liable in his own person and estate to the United States in a sum equal to the value of the property [fol. 30] or rights not so surrendered, but not ex-

ceeding the amount of the taxes for the collection of which such levy has been made, together with costs and interest on such sum at the rate of 6 percent per annum from the date of such levy.

(c) Person Defined.—The term "person," as used in subsection (a), includes an officer or employee of a corporation or a member or employee of a partnership, who as such officer, employee, or member is under a duty to surrender the property or rights to property, or to discharge the obligation.

(26 U.S.C. 1952 ed., Supp. II, Sec. 6332.)

Sec. 6334. Property Exempt From Levy.

(a) Enumeration.—There shall be exempt from levy—

(1) Wearing Apparel and School Books.—Such items of wearing apparel and such school books as are necessary for the taxpayer or for members of his family;

(2) Fuel, Provisions, Furniture, and Personal Effects.—If the taxpayer is the head of a family, so much of the fuel, provisions, furniture, and personal effects in his household, and of the arms for personal use, livestock and poultry of the taxpayer, as does not exceed $500 in value;

(3) Books and Tools of a Trade, Business, or Profession.—So many of the books and tools necessary for the trade, business, or profession of the taxpayer as do not exceed in the aggregate $250 in value.

• • • • • • •

[fol. 31] (c) No Other Property Exempt.—Notwithstanding any other law of the United States, no property or rights to property shall be exempt from levy other than the property specifically made exempt by subsection (a).

(26 U.S.C. 1952 ed., Supp. II, Sec. 6334.)

Treasury Regulations Relating to Assessment, Collection, Abatement, Credit, and Refund of Taxes (1954):

Sec. 301.6331-1. Levy and Distraint—(a) Authority to levy—* * *

* * * * * * *

(4) Certain types of compensation—* * *

(ii) State and municipal employees.—Accrued salaries, wages, or other compensation of any officer, employee, or elected or appointed official of a State or Territory, or of any agency, instrumentality, or political subdivision thereof, are also subject to levy to enforce collection of any Federal tax.

* * * * * * *

Constitution of West Virginia:

Article I

§ 1. The State of West Virginia is, and shall remain, one of the United States of America. The Constitution of the United States of America, and the laws and treaties made in pursuance thereof, shall be the supreme law of the land.

* * * * * * *

Article VI

* * * * * * *

§ 35. The State of West Virginia shall never be made defendant in any court of law or equity, except the State of West Virginia, including any subdivision [fol. 32] thereof, or any municipality therein, or any officer, agent, or employee thereof, may be made defendant in any garnishment or attachment proceeding, as garnishee or suggestee. (House Joint Resolution No. 3, Acts 1935, p. 662; 1935, c. 23, Ratified.)

1 West Virginia Code of 1955:

§ 1031(1). Deductions by State Auditor from Salaries of State Officials and Employees to Pay Taxes

and Purchase United States Government Bonds.—The auditor of the State of West Virginia is authorized to deduct and withhold sums from the salaries or other compensation of state officials and employees, to purchase United States government bonds and other United States government obligations, or to pay taxes as may be required by an act or acts of the congress of the United States of America.

* * * * * * *

§ 1041. Accounts of Expenditures; Signing of Checks and Warrants; Facsimile Signatures and Use of Mechanical and Electrical Devices; Forgery; Penalty.—* * * The auditor shall keep accounts of the particular heads of expenditures, and, when he issues his warrant on the treasurer, shall credit the treasurer's account therewith and charge the same under the particular head of expenditure to which it properly belongs, distinguishing especially the disbursements on account of the capital and the annual income of the school fund, as directed in section two (§ 1039) of this article in relation to receipts belonging to the said fund. * * *

[fol. 33] 2 West Virginia Code of 1955:

§ 3834(18). Service of Suggestee Execution.—An execution issued under this article against money due and owing or to become due and owing from the State, or a state agency which shall be payable on the warrant of the state auditor for the payment thereof directed to the judgment debtor must be served upon the state auditor at his office in Charleston. * * *

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Appendix B

Opinion of the District Court

The Court: I wish that there were some precedent for a construction of these statutes as they apply to a situation such as is before me here. I am sure that any precedent would be helpful, and if we had some decision which was binding on this court I would, of course, follow that decision; but having no precedent at all, then it is the duty of the court as I see it to do the best it can to interpret the statutes and apply them to the facts of the case.

While I am somewhat disturbed by the provisions of Section 6332(c) defining a person in that it does not mention officers or employees of a state, I think that there might be a valid argument that in not mentioning them they were intended to be excluded, but that would lead as I view it to a very illogical and unreasonable result.

As pointed out; while Section 6331 provides a method for levying on accrued salaries and wages of various federal employees and officials, there would be no way to collect any such levy if those departmental officials of the federal government were not held to be included as persons, then there is no reason why a departmental official of a state government should not also be included as a person.

[fol. 34] I think under the provisions of Section 6332(a), particularly the parenthetical phrase, that the state auditor was obligated with respect to the moneys which are due to employes in view of the fact that if an employe's wages were withheld and he felt that he had the right to payment of wages, his remedy would be by a writ of mandamus against the auditor, which would certainly not operate on the auditor in his capacity as an arm of the State of West Virginia and would necessarily operate upon him in his personal and individual capacity, and he would be required individually to comply with any order of the court that was made.

Now, being obligated with respect to that debt of the state and being, as I believe, included in the definition of person, I think that the law is clear that demand having been made on him for the payment of the money, and he having refused to pay it and having paid it over instead to the employe, and further in view of the statute which does give him authority to deduct and withhold sums from the salaries of state employes to pay taxes as may be required by act of Congress, that plaintiff here has established its clear right to the relief for which it asks.

I shall not attempt to state the amount because that can be gathered from the stipulation of facts, but the United States will be given a judgment against the defendant Edgar B. Sims individually for the amount of taxes as ascertained by the stipulation.

[fol. 35]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 7525

EDGAR B. SIMS, Appellant,

versus

UNITED STATES OF AMERICA, Appellee.

Appeal from the United States District Court for the Southern District of West Virginia, at Charleston

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[fol. 36]

ARGUMENT AND SUBMISSION—November 21, 1957

(omitted in printing)

IN THE UNITED STATES COURT OF APPEALS

ORDER REQUESTING PARTIES TO FILE WITHIN THIRTY DAYS BRIEFS SETTING FORTH LEGISLATIVE HISTORY, ETC.—December 10, 1957

The parties are hereby requested to file within thirty (30) days briefs setting forth the legislative history of Secs. 6321, 6331, and 6332 of the 1954 Internal Revenue Code, particularly any data reflecting the intent to authorize the filing of liens and levying of distraint upon the accrued income of state employees; and further, any available information as to the administrative *practice* in this respect from the date of I.T. 2405 until it was revoked by Rev. Rul. 55-227.

Morris A. Soper, United States Circuit Judge.
Simon E. Sobeloff, United States Circuit Judge.
Clement F. Haynsworth, Jr., United States Circuit Judge.

[File endorsement omitted]

[fol. 37]

IN UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 7525

EDGAR B. SIMS, Appellant,

versus

UNITED STATES OF AMERICA, Appellee.

Appeal from the United States District Court for the Southern District of West Virginia, at Charleston

---

OPINION—February 7, 1958

(Argued November 21, 1957.)

Before Soper, Sobeloff, and Haynsworth, Circuit Judges.

Fred H. Caplan, Assistant Attorney General of West Virginia, (W. W. Barron, Attorney General of West Virginia, on brief) for Appellant, and Mildred L. Seidman, Attorney, Department of Justice, (Charles K. Rice, Assistant Attorney General; Lee A. Jackson and Melva M. Graney, Attorneys, Department of Justice; Duncan W. Daugherty, United States Attorney, and Percy H. Brown, Assistant United States Attorney, on brief) for Appellee.

[fol. 38]

SOBELOFF, Circuit Judge:

The sole issue in this case is whether a state official who makes payment of accrued salaries to state employees in

disregard of a notice of levy by the Commissioner of Internal Revenue for taxes due the United States by such employees may be held personally liable.

Edgar B. Sims, State Auditor of West Virginia, appeals from a judgment of $519.71 entered against him individually in favor of the United States for refusing to surrender the accrued wages of three employees of the state after the District Director of Internal Revenue had served notices of levy upon him.

The three employees owed federal taxes upon earnings in endeavors apart from their state employment. The Commissioner of Internal Revenue made an assessment of tax deficiencies as to each and forwarded the assessments to the Director of Internal Revenue at Parkersburg, West Virginia, for collection. The Director demanded payment from each of them, and, the deficiencies remaining unpaid for more than ten days, he served on the State Auditor notices of levy upon their accrued salaries pursuant to Section 6331 of the 1954 Internal Revenue Code (26 U.S.C.A.).[1]

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[1] 26 U.S.C.A., Sec. 6331:

"(a) Authority of Secretary or delegate.—If any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the Secretary or his delegate to collect such tax (and such further sum as shall be sufficient to cover the expenses of the levy) by levy upon all property and rights to property (except such property as is exempt under section 6334) belonging to such person or on which there is a lien provided in this chapter for the payment of such tax. Levy may be made upon the accrued salary or wages of any officer, employee, or elected official, of the United States, the District of Columbia, or any agency or instrumentality of the United States or the District of Columbia, by serving a notice of levy on the employer (as defined in section 3401(d)) of such officer, employee, or elected official. If the Secretary or his delegate makes a finding that the collection of such tax is in jeopardy, notice and demand for immediate payment of such tax may be made by the Secretary or his delegate and, upon failure or refusal to pay such tax, collection thereof by levy shall be lawful without regard to the 10-day period provided in this section.

"(b) Seizure and sale of property.—The term 'levy' as used in this title includes the power of distraint and seizure by any means. In any case in which the Secretary or his delegate may levy upon property or rights to property, he may seize and sell such property or rights to property (whether real or personal, tangible or intangible)."

When the levies were made, the three employees had accrued "take home pay" totalling $519.71.
[fol. 39] On the advice of the office of the Attorney General of West Virginia, the appellant refused to honor the notices of levy; and issued to each of the employees a warrant for the payment of his salary.

Thereafter, the government brought this suit in the United States District Court for the Southern District of West Virginia against Sims pursuant to Section 6332 of the 1954 Internal Revenue Code, (26 U.S.C.A.),[2] to recover a sum equal to the value of the property not surrendered. As originally brought, the suit was against Sims individually and as Auditor of the State of West Virginia. The defendant filed a motion to dismiss the action, and the Court granted it insofar as it related to the defendant as [fol. 40] Auditor of West Virginia, but overruled it as to Sims in his individual capacity. On the stipulated facts, the court entered judgment against Sims in the amount of $519.71 plus interest, and this appeal followed.

In unambiguous terms, Section 6331 authorizes the collection of delinquent taxes "by levy upon all property and

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[2] 26 U.S.C.A., Sec. 6332:

"(a) Requirement.—Any person in possession of (or obligated with respect to) property or rights to property subject to levy upon which a levy has been made shall, upon demand of the Secretary or his delegate, surrender such property or rights (or discharge such obligation) to the Secretary or his delegate, except such part of the property or rights as is, at the time of such demand, subject to an attachment or execution under any judicial process.

"(b) Penalty for violation.—Any person who fails or refuses to surrender as required by subsection (a) any property or rights to property, subject to levy, upon demand by the Secretary or his delegate, shall be liable in his own person and estate to the United States in a sum equal to the value of the property or rights not so surrendered, but not exceeding the amount of the taxes for the collection of which such levy has been made, together with costs and interest on such sum at the rate of 6 percent per annum from the date of such levy.

"(c) Person defined.—The term 'person,' as used in subsection (a), includes an officer or employee of a corporation or a member or employee of a partnership, who as such officer, employee, or member is under a duty to surrender the property or rights to property, or to discharge the obligation."

rights to property" belonging to a delinquent taxpayer;[3] and it is not disputed that, in general, accrued wages are properly subject to levy. 9 MERTENS, TAXATION (1943), Sec. 49.165; *United States* v. *Long Island Drug Co.*, 115 F.2d 983, 986 (2 cir., 1940). See: 26 C.F.R. Sec. 301.6331-1 (a) (1); II-1 Cum. Bull., 172 (I. T. 1557) (1923).

In spite of the statute's broad language, the appellant contends that the accrued salaries of state employees must be treated differently. He relies heavily on the fact that in 1928 the Internal Revenue Service itself ruled that salaries of certain municipal officers were not subject to distraint [fol. 41] while in the hands of a city treasurer. VII-1, Cum. Bull., 72 (I.T. 2405) (1928).[4] Since this ruling was not expressly revoked until 1955 (1955-1 Cum. Bull., 551 (Rev. Rule 55-227), Sims contends that "there appears to have been congressional acquiescence in the longstanding interpretation."

Administrative interpretations are not absolute rules of law which must necessarily be followed in every instance,

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[3] However, subsection (a) of Section 6334 of the 1954 I.R.C. (26 U.S.C.A.) lists certain exemptions, including wearing apparel, school books, fuel, and provisions. Subsection (c) concludes that, "Notwithstanding any other law of the United States, no property or rights to property shall be exempt from levy other than the property specifically made exempt by subsection (a)."

[4] VII-1, Cum. Bull. 72 (I.T. 2405) (1928):

"The inquiry as to whether the collector may distrain upon the salaries of the officers and employees of the M Street Railway and the M Water Board while in the hands of the city treasurer is answered in the negative. In I. T. 1557 (C. B. II-1, 172) it was held that the *accrued* salary or wage of an employee subject to the call or order of such employee may be levied upon. Quite probably it would be within the power of Congress to authorize distraint upon salaries and wages paid by a State or municipality for services rendered in connection with the exercise of a non-governmental function. I. T. 1557, however, refers to salaries paid by private persons and corporations and is based upon the analogy of accrued wages to bank deposits, within the purview of section 3187, Revised Statutes, and not upon any specific provision of that section. It is not believed that the analogy should be extended to include salaries paid by a State or municipality operating public utilities, even though such activities are considered a proprietary rather than a governmental function."

but are only helpful guides to aid courts in their task of statutory construction. The extent to which a court will place reliance upon an administrative interpretation depends on the circumstances, including the general purpose of the act, the authoritative source of the regulation or ruling, the clarity of the statutory language, the consistency of administrative policy, and whether administrative interpretation was brought to the attention of the legislators when they re-enacted, modified, or refused to change the statute. Cf., e.g., *Helvering* v. *N. Y. Trust Co.*, 292 U.S. 455 (1934); *United States* v. *Leslie Salt Co.*, 350 U.S. 383 [fol. 42] (1955). See: Brown, "Regulations, Reenactment and the Revenue Acts," 54 Harv. L. Rev. 377 (1941).

Since departmental rulings not promulgated by the Secretary of the Treasury "do not commit the Department to any interpretation of the law which has not been formally approved and promulgated by the Secretary" (see the cautionary notice published as a preface to the Cumulative Bulletins), Mr. Justice (later Chief Justice) Stone referred to them as being "of little aid in interpreting a tax statute." *Biddle* v. *Commissioner*, 302 U.S. 573, 582 (1938). The first authoritative declaration was not made until 1955, shortly after the enactment of the Internal Revenue Code of 1954 (but before the levy in this case[5]), when a Treasury Regulation, 26 C.F.R. Sec. 301.6331-1 (a) (4) (ii), expressly declared that Section 6331 permitted levy on accrued salaries of state and municipal employees. That the Treasury Department was not committed to the 1928 ruling (I.T. 2405) is borne out by the fact that there was no uniform adherence to its principle, but rather that it was repeatedly, if not consistently, ignored. It is noted that as early as 1935, the Government sought to levy upon the accrued salary of an employee of Woodbury County, Iowa. See: *United States* v. *Brechtel*, 90 F.2d 516 (8 cir., 1937).[6] There

[5] The regulation went into effect on January 1, 1955. 1955-1 Cum. Bull., p. 195, Sec. 7851. Two of the notices of levy were served on Sims on October 27, 1955, and the third was served on December 14, 1955.

[6] The court held, on the authority of *Collector* v. *Day*, 11 Wall. 113 (1870), that the salary was not constitutionally subject to levy. See: *Helvering* v. *Gerhardt*, 304 U.S. 405 (1938); *Graves* v. *N.Y.*,

[fol. 43] are numerous other instances of levies on state employees' salaries.[7]

It does not appear that Congress was, at any time, cognizant of the 1928 ruling (I.T. 2405), and, for this additional reason, it cannot be said that it received legislative ratification. "Whenever congressional awareness of the administrative interpretation does not appear and seems unlikely, the basis for the re-enactment rule vanishes." - DAVIS, ADMINISTRATIVE LAW (1951), Ch. 5, Sec. 59, p. 208. Dean Griswold has said, ". . . the mere re-enactment of a statute following administrative construction should be given no weight whatever in determining the proper construction of the statute." Griswold, "A Summary of the Regulations Problem," 54 Harv. L. Rev. 398, 400 (1941). The evidence is to the contrary of the basic assumption of the re-enactment rule, for when the Chief of Staff of the Joint Committee on Internal Revenue Taxation inquired, in 1950, whether the statutes relating to levy were applicable to a state, the Acting Commissioner of Internal Revenue replied in a letter that "this office believes it has the authority to collect taxes from State employees and contractors who are delinquent as regards those taxes by service of notices of levy on State officials holding monies due to those delinquent taxpayers." Thus, if any Congressional ratification of administrative policy is to be found, it would appear that Congress ratified the practice of which it was specifically made aware rather than the earlier ruling of which there is no evidence that it had any knowledge.

[fol. 44] The appellant has suggested that the express provision in Section 6331 for levy upon the accrued salaries

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ex rel. O'Keefe, 306 U.S. 466, 486 (1939), explaining that the effect of *Helvering* v. *Gerhardt* is that *Collector* v. *Day* and the cases decided thereunder "are overruled so far as they recognize an implied constitutional immunity from income taxation of the salaries of officers or employees of the national or a state government or their instrumentalities."

[7] E.g., the June 23, 1943, issue of the *Wall Street Journal* contains an article entitled, "U. S. Acts to Prevent Income Tax Evasion by N. Y. State Workers," relating that a notice of levy had been served upon New York officials and that the State Comptroller, on advice of the Attorney General of New York, honored it.

of employees of the federal government and the omission of reference to state employees indicate an intention on the part of the legislators to withhold authorization from the Commissioner of Internal Revenue with respect to the latter. The legislative history of Section 6331 does not reveal the existence of any such negative intention, however, and both the House and the Senate Committee Reports merely contain the statement that "The provisions as to levy on salaries of Government employees are the same as those applicable to any other delinquent taxpayer." H. Rep. No. 1337, 83rd Cong., 2nd Sess., S. Rep. No. 1622, 83rd Cong. 2nd Sess., 1954 U. S. Code Cong. and Admve. News, pp. 4556, 5225.

Another and more likely explanation is at hand for the specific reference in Section 6331 to levy upon federal employees' salaries and the failure to mention state employees. It lies in a problem peculiar to the federal government. In *Smith* v. *Jackson*, 246 U.S. 388, (1918), it was held that a federal disbursing officer has no right to set-off, against a federal employee's salary, for debts owing to the United States. Accordingly, the Comptroller General ruled that notices of levy are "attempts to set off the tax indebtedness due to the United States against moneys due from the United States to the debtor," and "the administrative official served with such notice would be without authority to withhold any portion of the current salary of such employee in satisfaction of the notices of levy and distraint." 26 Comp. Gen. 907, 912 (1947). Undoubtedly, Section 6331 was designed to alleviate this difficulty and to subject federal employees to the same collection procedures as are available against all other taxpayers, including employees of the state.

[fol. 45] It is noteworthy that a closely related collection remedy, the tax lien, has been held applicable to money in the hands of a state. Where the State of California owed rent to a delinquent taxpayer, it was held that the Government could establish a lien upon it, and that the state could properly be subjected to a suit to foreclose the lien. *United States* v. *Graham*, 96 F.Supp. 318 (S.D. Calif., 1951), aff'd. *sub. nom., State of California* v. *United States*, 195 F.2d 530 (9 cir., 1952), *cert. den.*, 344 U.S. 831. See also, *United*

States v. *Newhard*, 128 F.Supp. 805 (W.D. Pa., 1955), where the government successfully enforced a tax lien against the wages of a county employee. It would indeed be an incongruity for the lien and levy provisions to receive contrary interpretations, particularly as the language of Section 6321, which provides for "a lien in favor of the United States upon all property and rights to property" of a delinquent taxpayer, is almost identical with the language of Section 6331. Neither logic nor the language of the statute demands such a result.

There is no Constitutional requirement that the salaries of state employees shall be treated differently from the salaries of others. *Helvering* v. *Gerhardt*, 304 U.S. 405 (1938); *Graves* v. *N. Y., ex rel. O'Keefe*, 306 U.S. 466, 486 (1939). And the statute, Section 3401(C), 1954 I.R.C., (26 U.S.C.A.) which defines "employees," for withholding tax purposes, in terms includes state employees. More broadly considered, as Mertens said in commenting upon the 1928 ruling (I.T. 2405), "There seems to be no conceivable ground for this discrimination in favor of such employees." 9 MERTENS, TAXATION (1943), Sec. 49.165, p. 141, n. 41. "As we have frequently pointed out, statutes should be construed to avoid absurd consequences, as Congress must be presumed not to have intended what was absurd. . . ." [fol. 46] *Jacobs* v. *Tawes*, F.2d , (4 cir., 1957).

Accordingly, we hold that Section 6331 authorized levy upon the accrued salary of a state employee.

Sims next contends that, even if the salaries of state employees may be levied upon, he is not subject to the suit for penalty because he is not a "person in possession of (or obligated with respect to)" the property upon which the levy was made. 26 U.S.C.A. Sec. 6332. He argues that if he was in possession of the wages, he was in possession of them (or obligated with respect to them) in his capacity as State Auditor and that, "As an individual, the appellant had no more possession of or control over the wages of the taxpayers than any other individual private citizen of the state." Since the action against him as State Auditor has been dismissed, and he is now being sued only as an individual, Sims concludes that he cannot be liable.

However, by its very definition of the word "person," Section 6332 permits an action against an individual "in

his own person and estate" who has held property subject to levy in a purely representative capacity or whose obligation with respect to property arises solely from his employment. In terms, it includes a person who as "officer, employee, or member is under a duty to surrender the property or rights to property, or to discharge the obligation."

We hold that under the laws of West Virginia, the State Auditor is an officer obligated with respect to the salaries of state employees within the meaning of Section 6332. He issues the warrants directing the disbursement of wages, and employees entitled to payment for their services may [fol. 47] enforce their rights by mandamus against him. *State* v. *Sims*, 55 S.E. 2d 505, 133 W. Va. 239 (1949); *State* v. *Sims*, 68 S.E. 2d 489, 490, 136 W. Va. 789 (1952); *State* v. *Sims*, 82 S.E. 2d 321, 328, 140 W. Va. 64 (1954). In addition, the State Auditor is authorized to deduct and withhold sums from employees' wages "to pay taxes as may be required by an act or acts of the congress of the United States of America." 1 W. Va. Code (1955), Sec. 1031(1). Therefore, Sims having been under a duty to surrender the property demanded of him, he is subject to the penalty which Section 6332 imposes upon any person who fails or refuses to honor the levy, namely, liability in his own person and estate to the United States in a sum equal to the value of the property or rights not so surrendered.

Sims urges, however, that his refusal to honor the notices of levy was an act performed within the scope of his official duty and that he should not be personally liable for the consequences. It is, of course, generally true that a public officer engaged in non-ministerial duties will not be civilly liable for an act performed within the scope of his authority, even if that act is based upon an erroneous construction of law. The rule is a reasonable one, designed to protect public officers from the harassment of private individuals allegedly injured by the official acts, and to insure effective administration of the law. 43 Am. Jur., "Public Officers," Secs. 274, 275, p. 87; *Cooper* v. *O'Connor*, 99 F.2d 135, 138 (D.C. App., 1938); *Randall* v. *Brigham*, 7 Wall. 523, 536 (U.S., 1868); *Papagianakis* v. *The Samos*, 186 F.2d 257, 260 (4 cir., 1950). But that is not to say that the Congress may not insure

the effective administration of the federal tax laws and secure its rights in the collection of revenue by imposing a penalty upon those who refuse to honor government levies. [fol. 48] We do not overlook the fact that the definition of "person" in Section 6332(c), in terms includes an officer or employee of a corporation who, as such officer or employee, is under a duty to surrender property or rights, but does not specifically mention public officers. It is not to be supposed, however, that Congress intended the definition to be restrictive and applicable only to corporate officers. In a legal context where, as we have seen, salaries due public employees are subject to the lien and levy procedures that apply to others, no reason appears for interpreting Subsection (c) of Section 6332 as narrowing the breadth of the other subsections which insure the effectiveness of levies made upon salaries of public employees.

We hold that Congress has imposed the liability of Section 6332 upon any person who refuses to surrender property subject to the provisions of Section 6331, including state officials.

The judgment must, therefore, be

Affirmed.

[fol. 49]

IN UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 7525

EDGAR B. SIMS, Appellant,

vs.

UNITED STATES OF AMERICA, Appellee.

Appeal from the United States District Court for the Southern District of West Virginia

JUDGMENT—February 7, 1958

This Cause came on to be heard on the record from the United States District Court for the Southern District of West Virginia, and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

Morris A. Soper, United States Circuit Judge.
Simon E. Sobeloff, United States Circuit Judge.
Clement F. Haynsworth, Jr., United States Circuit Judge.

[File endorsement omitted]

[fol. 50]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

[Title omitted]

PETITION OF APPELLANT FOR REHEARING—
Filed March 7, 1958

To the Honorables the Judges of the United States Court of Appeals for the Fourth Circuit:

Edgar B. Sims, appellant above named, respectfully petitions this Honorable Court for a rehearing of the appeal in the above entitled cause. The petitioner, in support of [fol. 51] his petition, represents to the Court as follows:

1. Petitioner was the appellant in this cause, which was argued on November 21, 1957, and decided by the Court on February 7, 1958, on which latter date judgment was entered. This petition for rehearing is being tendered for filing in accordance with the provisions of Rule 19 of the Revised Rules of the United States Court of Appeals for the Fourth Circuit.

2. Petitioner submits that he has been aggrieved by the opinion of Your Honors rendered in this cause and the judgment entered herein, affirming the judgment from which this appeal was taken. The respects in which petitioner has been aggrieved are hereinafter set forth.

3. Petitioner respectfully urges that Section 6332 of the Internal Revenue Code of 1954 is a penal statute, and as such should be strictly construed. This would preclude the reading into the statute of the words "state" or "officer or employee of a state." Consequently, the term "person," as used in said statute, does not include an officer or employee of a sovereign state and thus, does not include this petitioner.

4. Petitioner concedes that the Constitution of the United States authorizes Congress to enact laws comparable to the sections in question for the purpose of levying on salaries or wages of officers or employees of a state and that this could be accomplished in the same manner as it did to reach officers and employees of the federal government. However, it is respectfully submitted that Congress has not enacted [fol. 52] such laws. Consequently, officers and employees of a state are not included in the law as it exists.

5. Petitioner respectfully directs the attention of this Court to Section 7701 of the Internal Revenue Code of 1954, wherein the definitions of "person," "partnership and partner," and "corporation" are set forth in relation to their use and meaning in the Internal Revenue Code. It is submitted that the state is not included in any of the foregoing terms.

6. Petitioner respectfully urges that Chapter 12, Article 3, Section 13a of the West Virginia Code (Michie, Sec. 1031(1)) was enacted for the specific purposes of enabling deductions to be made from the wages of state employees for the purchase of government bonds and for the withholding of income taxes due from moneys earned in state employment. This is not to say, however, that the legislature intended such statute to be used to permit the service of the instant levies for the collection of delinquent taxes on income earned in ventures other than state employment.

7. Petitioner respectfully submits that any act of Congress, which is contrary to well-established law, thereby imposing personal liability on a public official, who previously was immune therefrom, should be enacted in clear and express terms and not in vague, ambiguous and obscure language which requires interpretation.

Wherefore, petitioner respectfully urges that a rehearing may be granted, and that the mandate of this Court may [fol. 53] be stayed pending the disposition of this petition.

Respectfully submitted,

Edgar B. Sims, Petitioner, By Counsel.

W. W. Barron, Attorney General, Charleston, West Virginia.

Fred H. Caplan, Assistant Attorney General, Charleston, West Virginia, Counsel for Petitioner.

[fol. 55]

IN UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

[Title omitted]

ORDER DENYING REHEARING—Filed and Entered March 13, 1958

This Court having on February 7, 1958, rendered its decision affirming the judgment of the District Court appealed from in this cause, and the Appellant having on March 7, 1958, filed a petition for rehearing of the said cause, and the same having been carefully considered,

It is now here ordered by this Court that the rehearing asked for, be, and the same is hereby, denied.

Morris A. Soper, United States Circuit Judge.
Simon E. Sobeloff, United States Circuit Judge.
Clement F. Haynsworth, Jr., United States Circuit Judge.

[File endorsement omitted]

March 21, 1958, mandate issued and transmitted to the Clerk of the United States District Court at Charleston, West Virginia.

March 21, 1958, record on appeal and amended record on appeal returned to the Clerk of the United States District Court at Charleston, West Virginia.

[fol. 56] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 57] SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING CERTIORARI—October 13, 1958

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Briefs.